Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-215

KINLOCH SCHOOL DISTRICT and JOHN A. WRIGHT, Superintendent,
Petitioners,

vs.

UNITED STATES OF AMERICA; STATE OF MISSOURI; MISSOURI STATE BOARD OF EDUCATION; ARTHUR L. MALLORY, Commissioner of Education; F. BURTON SAWYER, President, SIDNEY R. REDMOND, W. C. BANTA, JOHN M. MORRIS, DALE M. THOMPSON, JACK WEBSTER, ELEANOR B. GRIFFITH, HARVEY B. YOUNG, JR., Members of the Missouri State Board of Education; ST. LOUIS COUNTY BOARD OF EDUCATION, GEORGE W. VOSSBRINK, Superintendent, ROBERT S. WEINSTOCK, President, QUINTON C. KELLER, PAUL A. LEUPOLD, FRED R. SMALL, GLENN A. SWEET, CLARENCE J. WOHLWEND, Members of the St. Louis County Board of Education,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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Petitioners, Kinloch School District and John A. Wright, its Superintendent, pray that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled cause on May 14, 1975.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals, not yet reported, is reprinted, Joint Appendix, pp. 1-16. Hereafter references to the Joint Appendix are indicated by page numbers in parentheses.

The United States District Court's initial Findings of Facts and Conclusions of Law (16) (363 F. Supp. 739) and the United States District Court's Findings and Judgment of January 9, 1975, 388 F. Supp. 1038 are reprinted (36).

The District Court's Order of June 7, 1975 is reprinted at (46).

JURISDICTION

The judgment of the Court of Appeals was entered May 14, 1975. This petition for certiorari is filed within 90 days thereafter. The jurisdiction of this Court is invoked 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

I

Where a small black school district exists today, as a direct result of a racially motivated division of a single school district in 1937 should not the desegregation remedy be limited to a re-creation of the original school district?

II

Does the Federal District Court have power to compel merger of an adjacent school district in its desegregation plan, said district not having contributed to the establishment or maintenance of a small black school district?

III

Do the limitations on a Federal Court's power to order inter district remedies in school desegregation cases apply when not area wide or multi-district in scope?

IV

Does a Court have authority to compel consolidation of a contiguous district to remedy a de jure segregation problem found to exist in two other districts absent evidence that such contiguous district failed to operate a unitary system, or its boundary lines were established for the purpose of fostering racial segregation and absent any finding that said district committed acts which effected segregation within the other districts?

V

Does the Court have authority to adopt a plan of desegregation which will lessen the burden on a small black school district over an alternate plan which increase the burden on such school district?

STATEMENT OF THE CASE

Before 1937 the present Kinloch and Berkeley School Districts were one district known as Kinloch School District No. 18 (20). Students were segregated by law (20). After two unsuccessful attempts to divide Kinloch School District into two separate districts, one white, one black, the City of Berkeley was incorporated and a new school district was formed, namely, the present Berkeley School District (21) the effect of which was to isolate Kinloch as a virtually all black district and to situate Berkeley as an all white district (22).

This "split" was found to be racially motivated on ample record evidence. Today the Kinloch School District is virtually all black, poor and isolated school district with a low tax base and inferior educational facilities (25). Berkeley School District has developed into a school district enjoying a high tax base, low tax rate, and excellent facilities (24).

The District Court found that the Kinloch School District was and is unconstitutionally segregated and its students are now and have been denied equal educational opportunities (30-33). Its final order was to order annexation by the Ferguson-Florissant School District of both Berkeley and Kinloch—(area comprising old Kinloch District No. 18) under a plan promulgated by the State Department of Education of Missouri (40).

The Kinloch School District does not believe that Ferguson-Florissant School District had anything to do with the creation or maintenance of Kinloch as an all black, poor district and further believes its burden will be lessened if the old Kinloch School No. 18 is restored.

Kinloch's position before the courts below has been that legally and equitably the remedy herein should be the consolidation of the Kinloch and Berkeley School District, or the re-establishment of the Kinloch School District No. 18 as it existed prior to 1954 or in 1937. This re-consolidation would correct substantially all of the inequities resulting from the constitutional violation of 1937 by the Berkeley School District and has the whole hearted support of the Kinloch community and School District.

REASONS FOR GRANTING THE WRIT

I

The Remedial Decision Below Conflicts With the Decisions of the United States Supreme Court Involving Inter-District Consolidation.

Since the constitutional violation was the 1937 division of the Kinloch School District No. 18 into the present school districts of Berkeley and Kinloch, the remedy in this case should be limited to the reconsolidation of that district as it formerly existed.

Had the Kinloch School District No. 18 remained as it was in 1937 and prior years, namely one school district, the conclusion is clear that the remedy in this matter would call for intra-district relief within the confines of Kinloch District No. 18.

Were the attempt made today to divide or split Kinloch District No. 18, such conduct would run afoul of *Wright v. Council of City of Emporia*, 407 US 451 (1972) and *United States v. Scotland Neck Board of Education*, 407 US 484 (1972) where it was held that separation of school districts which creates racial disparity and hinders desegregation efforts violates the constitutional mandate of *Brown I*.

The line now existing between the Kinloch and Berkeley School Districts was racially motivated. This being true, that line existing today should be erased in order to bring about a "scope of the remedy" that is limited to "the extent of the violation".

It is significant that in the two cases in which this court has considered inter-district consolidation, the remedial relief was limited to the district wherein the constitutional violation was found to exist. Surrounding and adjacent districts were in-

cluded in the relief by the District Courts, but this action was overturned by the Supreme Court. In the case of *Bradley v. School Board of Richmond*, 412 US 92 (1973), affirming 462 F 2nd 1058 (4 Cir. 1972), the Supreme Court set the outer limits of the equitable powers of federal courts to remedy of racial imbalance in public schools. In *Milliken v. Bradley*, 94 S Ct 3113 (1974) the Supreme Court articulated the bounds of a definite limit to the equity power of federal courts in school desegregation cases.

A

The case of *Bradley v. City of Richmond School Board*, 412 US 92 (1973), affirming 462 F 2nd 1058 (4th Cir. 1972), was on its facts, a much stronger case for inter-district consolidation than is the instant case.

In *Bradley*, the state education officials and school boards of counties adjoining the city district were alleged to have engaged in cooperative efforts to create and maintain school boundaries which had the effect of locking blacks in the core city. The lower court found local and state action which had maintained the dual system within the city, e.g., school sites, construction, transportation, pupil assignment plans promoted segregation. The District Court found active participation by the boards of the suburban counties also. *Bradley v. School Board*, 338 F Supp. at 168. Also, an act of the legislature was said to have thwarted a desegregation plan for high schools.

The Fourth Circuit Court of Appeals held however that on that record, there was no discriminatory acts which amounted to a violation which had the effect of depriving the black students within the city of Richmond of the right to attend a unitary school system. In that case the court said:

> In devising remedies in school cases, it is difficult to know how far a Court can go, but it must be recognized that

there are limits. *Swann*, 402 US at 28, 91 S.Ct. at 1282. In *Spencer v. Kugler*, 326 F. Supp. 1235 (DNJ 1971), Affd. Mem. 404 US 1027, 92 S.Ct. 707, 30 L.Ed. 2d 723 (1972), black plaintiffs sought to compel the joinder of separate school districts within the State of New Jersey for the purpose of achieving racial balance and preventing de facto segregation. The three judge court held de facto segregation, defined as racial imbalance, that exists through no discriminatory action of state authorities, to be beyond the ambit of the Fourteenth Amendment. On appeal, the decision was affirmed without opinion by a nearly unanimous United States Supreme Court. We think *Spencer v. Kugler*, supra, is indistinguishable and controls the decision in this case.

Because we think that the last vestiges of state-imposed segregation has been wiped out in the public schools of the City of Richmond and the counties of Enrico and Chesterfield and unitary school systems achieved, and because it is not established that the racial composition of the schools in the City of Richmond and the counties is the result of invidious state action, we conclude there is no constitutional violation and, therefore, the District Judge exceeded his power of intervention.

As in the Richmond case, where the findings of inter-district discrimination were said to have been delineated with such a broad brush as to "make it difficult on review to say precisely what the violation was, if any", so are the findings relative to Ferguson-Florissant in the instant case.

What were the District Court findings in respect to Ferguson-Florissant?

In paragraph 15, P. 25 of Joint Appendix it is stated: "on the one occasion when consolidation of Kinloch with Berkeley and

Ferguson-Florissant Districts was recommended, the reorganization proposal was defeated by referendum." A similar statement appears in the Court's conclusions of law (32). An analysis of the vote shows that that part of Ferguson-Florissant involved in the vote was evenly divided. All of the other findings relate to action by the State or county defendants only and not Ferguson-Florissant. There is no evidence in this record that anyone in the Ferguson-Florissant district did anything to perpetuate Kinloch as an all black district. Even the Eighth Circuit Court of Appeals admitted that Ferguson-Florissant had nothing whatever to do with the creation of Kinloch (9).

There is no evidence in this record of "joint interaction" involving Ferguson-Florissant for the purpose of promoting segregation. (Bradley v. School Board, 462 F (2) at 1065). Nor is there evidence that its boundaries were established for such purpose. If Ferguson-Florissant is now and has been operating a unitary system (and there is no record to the contrary herein) within the meaning of: *Swann v. Charlotte-Mecklenberg Board of Education*, 402 US 1, 91 S.Ct. 1267, 28 L Ed (2) 554 (1971), and *Green v. County School Board*, 391 US 430 (1968), then it should not be included in any plan to desegregate Kinloch.

B

In *Milliken* the allegation was that Detroit was segregated on the basis of race, even though schools in Michigan have never been maintained in a dual system by law. The trial court found ample evidence of de jure segregation within the city of Detroit, however, there was no finding of constitutional violations by the school districts sought to be annexed.

Relief ordered by District Court and affirmed by Appellate Court was held to have been based upon an erroneous standard and was unsupported by record evidence that acts of outlying

school districts affected the discrimination found to exist in Detroit schools, and, absent proof of multi-district constitutional violations, a federal court cannot impose a multi-district area-wide remedy for a single district de jure school segregation violation, and the remedy directed at elimination of segregation found to exist in the Detroit city school district accordingly must be confined to that district alone. *Milliken v. Bradley*, 94 S.Ct. 3112 (1974).

Certain definite limitations on the power of federal courts in dsegregation cases are stated in the majority opinion. These limitations are:

1. Unless an inter-district violation is shown, school district boundaries are sacrosanct.

2. While state law including political subdivisions must give way to the 14th Amendment, a showing of a constitutional violation having a segregatory impact across district lines would be required to offset the principles of federalism which supported the inviolability of the school district boundaries.

3. Historic system of local control over schools is to be respected.

4. An inter-district remedy is permissible only where it was "shown that there has been a constitutional violation within one district which produces a significant segregative effect in another district."

5. All districts encompassed in a desegregation order must have participated in discriminatory activities.

6. Victims should be put back in the same position that they were absent the discrimination.

7. An isolated instance of an inter-district violation may not be sufficient to invoke an inter-district remedy.

8. Participation of state officials in the segregation does not provide state action sufficient to justify an inter-district remedy.

Tested by the above principles it is clear that the proper remedy in the instant case is the erasure of the boundary line between Kinloch and Berkeley. The real cause of Kinloch's problems has been the 1937 division of Kinloch School District No. 18. This was the constitutional violation. The remedy should be the re-establishment of the Kinloch school district No. 18.

There has been no inter-district violation shown on the part of Ferguson-Florissant. Its vote did not defeat the referendum in 1949. It is not responsible for what the state and county officials thought about re-submission of reorganization plans. Ferguson-Florissant's boundaries should therefore be respected. It should not be brought into the plan just because it is adjacent to Kinloch.

That state officials may have been to some degree responsible for the separation of Kinloch from Berkeley in 1937 is not sufficient to justify an inter-district remedy. If the victims are put back in the same position that they were absent the discrimination and the discrimination is the action that isolated Kinloch as a poor black district in 1937 then the reconsolidation of Kinloch School District No. 18 is the only remedy permissible in this case.

There is no justification for the District Courts findings that "each defendant, including the Ferguson-Florissant School District, is, to a substantial degree responsible for the maintenance of Kinloch as a segregated district" or of the Eighth Circuit Court of Appeals statement that "However, the district courts findings that Kinloch has been unlawfully maintained by each of the defendants including Ferguson-Florissant, for racially discriminatory reasons from 1937 to the present are not clearly erroneous." (9).

It cannot be logically said that if the state and county defendants have proposed reorganization plans, but have not included Kinloch because it was all black is sufficient to mandate an inter-district remedy involving Ferguson-Florissant.

C

Concededly, Kinloch was isolated as a school district by virtue of state law as it existed in 1937 and all of the facts and all of the legal conclusions reached by the District Judge calling for the desegregation of Kinloch are concurred in by the Kinloch School District. Other than providing a legal vehicle, Kinloch was isolated as a poor, black district by the predecessors of the present Berkeley School District, and not by action of the state or local officials. Since the doctrine of separate but equal schools under *Plessey v. Ferguson*, 163 US 537 then prevailed, there was nothing either the state or county defendants could have done to block the Berkeley action. After *Brown v. Board of Education*, 347 US 483 (1954), neither the state or county defendants had the power to force consolidation of these two school districts.

Missouri laws make each school district master of its own destiny. The ultimate boundaries, operation, maintenance, governance, consolidation, reorganization and annexation are within the exclusive control of the voters of each local district (App. 110, 112-134).

In ordering a three district merger, the District Court here has done what the courts refused to do in *Bradley v. Richmond*, and *Milliken v. Bradley*, 92 S Ct 3112 (1974), under similar facts, excepting size. In *Milliken* the district court had found that the schools in the city of Detroit were segregated by official action and inaction on the part of state and local officials, and ordered a multi-district, area-wide remedy to bring about sig-

nificant desegregation which would not otherwise be brought about.

The limitations of federal courts in desegregation cases enunciated in that case compel the conclusion that legally and equitably Kinloch should be reconsolidated with Berkeley so as to reconstitute Kinloch School District No. 18.

Both the *Bradley* (Richmond) and the *Milliken* (Detroit) cases put to rest the assertion that meaningful desegregation means any particular race mix. In *Bradley* a race mix of 60 percent black and 40 percent white was approved in Richmond. In *Milliken* a race mix of 66 percent black and 34 percent white was approved in Detroit. This in accordance with *Swann v. Board of Education*, 401 US 1, which case in effect prohibits racial quotas in desegregation cases.

In the instant case, the racial makeup based upon 1973 enrollment stated in the Kinloch-Berkeley plan (App. 105) was 54.09 percent white and 45.91 percent non-white. Kinloch asserts that there is no justification legally or equitably for the statement that "the state and county rejected the Berkeley-Kinloch plan as a viable alternative as it offered little chance for meaningful desegregation", appearing in the opinion of the Eighth Circuit Court of Appeals (App. 11).

Race mix, racial balance and similar factors have been rejected as true reasons for or against desegregation plans. *Swann v. Charlotte-Mecklenburg Board of Education* (supra); *Winston-Salem Forsyth Board of Education v. Scott*, 404 U.S. 1221 (1971), and *Milliken v. Bradley* (supra).

II

The Consolidation of the Kinloch and Berkeley School Districts Is the Relief Desired and Requested by Kinloch.

Since the facts in respect to the 1937 division of Kinloch School District No. 18 have come to light, the present Kinloch community demand that Kinloch School District No. 18 be restored, and that the inclusion of Ferguson-Florissant in the plan amounts to punishment of the black community of Kinloch.

The reasons for this position should be given consideration. They are:

1. Kinloch children are within walking distance of many Berkeley schools. (150)

2. The approved plan requires school attendance some distance out of the Kinloch area.

3. Kinloch loses its identity and control.

4. Its taxes are raised, but would be decreased if a Kinloch-Berkeley merger should be approved. (88-89).

5. Many Kinloch schools will be demolished. This plus inability to attend close-by Berkeley schools is considered punishment. (91-92).

6. Parental control is lost but would not be if children would attend close by Berkeley schools.

7. Busing is much more extensive under a 3 district plan than it would be in a Kinloch-Berkeley merger. (93-94).

8. Kinloch residents resent the argument of "white flight" which has been advanced in opposition to a Kinloch-Berkeley

merger. This argument was rejected in *Lee, et al. v. Macon County Board of Education*, 448 F 2d 746 (5th Cir. 1971).

9. The overall burdens of three district merger will not fall as heavily on Kinloch in a Kinloch-Berkeley merger. See *Bivins v. Bibb County Board of Education*, 460 F 2d 430 (5th Cir. 1972), and *Clark v. Board of Education of Little Rock School District*, 449 F 2d 493 (1971, 8th Cir.).

10. The adoption of a Kinloch-Berkeley plan would promote the neighborhood concept, which to some courts is extremely valuable. *Deal v. Cincinnati Board of Education*, 369 F. 2055 (1966), Cert. den. 389 U.S. 847 (1967).

The consolidation of Kinloch and Berkeley is more nearly in accord with the provisions of the *Educational Amendments Act* of 1974, 20 USC 1701 et seq. Section 216 refers to the drawing of lines for purposes of segregation. This section would apply to the original line separating Kinloch and Berkeley. Section 214(a) would favor Kinloch-Berkeley merger since children would be assigned to schools closer to their homes under the plan. Section 256 would seem to require a Kinloch-Berkeley combination as an alternate to a three district merger.

Considering the factual situation from 1937 to the present time, would it not be more equitable to adopt a plan which erases the line between Berkeley and Kinloch, which would be less expensive, would involve less busing, would not result in a tax increase for Kinloch residents, would preserve the concept of neighborhood schools, would give more control to Kinloch residents and which the Kinloch students, parents, Board and administration want, than to adopt a plan which would result in more taxes, more busing and for longer distances, loss of control by board members and parents, and which the Kinloch children, parents, board and administration do not want?

Should not some consideration be given to the wishes of the people who have been educationally deprived for almost 40 years due to an unconstitutional division of the Kinloch School District No. 18?

CONCLUSION

For the foregoing reasons a writ of certiorari should issue to review the decision of the Eighth Circuit rendered May 14, 1975.

Respectfully submitted

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Dated August 6, 1975.

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